The question before the court was simply this — whether the respondents were entitled to lodge this second caveat when the first had been removed.

The question has been considered by these courts previously and the answer has been that once a caveat is removed, the removal is conclusive and it is extinguished forever.

In the first case Syed Agil Barakbah in *Damodaran* v. *Vasudeva*[2] states as follows: —

"In the present case, the respondent on receipt of notice of the intention for the intended removal of the caveat from the Registrar on September 7, 1973, should have applied to the court for its extension under sub-section (2). Instead of doing so he applied for and obtained another caveat when the first caveat was still in existence. The result is that in the absence of such application for extension under sub-section (2) the first caveat according to sub-section (1)(b) must be removed by the Registrar on October 7, 1973, i.e. on the expiry of one month as specified in the notice. In other words, on that date the first caveat would no more be in existence.

Now, in answering the main question one has to look at sub-section (2) of section 326. The object of the sub-section is dealt with in precise detail by Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy* v. *Hamzah* ([1966] 2 M.L.J. 175 at page 176) which I accept with respect. It is clear that the word "extend" appearing in the sub-section has to be construed according to "its use in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than re-vest an expired right". In other words, it points to the existence of a caveat which it allows to be extended by order of court from time to time. It does not speak of a re-creation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat has lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the court has no power to revive, renew or continue a caveat after its lapse. The extinction is final and irrevocable. (*Per* Ong J. (as he then was) in *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.* [1959] M.L.J. 257). If the sub-section were to be construed otherwise a great public injury would be effected by calling back a right that by lapse of time has become extinct. (*Per* Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy's* case, *supra*). Further, section 328(1) provides for a caveat to lapse at the expiry of six years from the time from which it took effect unless earlier withdrawn or removed. Considering its object and function the period is long enough for one caveat to be in existence at any one time without there being entered another caveat.

The provisions of section 329(2) requires scrutiny. It disallows the Registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in cases where the court has ordered the removal of the former or has turned down an application for extension of time. The sub-section must be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under section 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator."

This construction of the provisions of the National Land Code *re* Caveats was followed and applied by Syed Othman J. (as he then was) in the case of *Arul Chandran* v. *Tara Rajaratnam*[2] where, at page 174, he states as follows: —

"In dealing with this point, I need only advert to the judgment of Syed Agil Barakbah J. in *Damodaran* v. *Vasudeva* ([1974] 1 M.L.J. 128, 129) where at page 129 he discussed several authorities. He referred to *K.I. Muhiuddeen Rawther* v. *K.E.P. Abdul Kassim* ([1959] M.L.J. 257) where Ong J. (as he then was) said that the extinction of a caveat is final and irrevocable. It seems to be established law that the court has no power to remove, renew or extend a caveat after its lapse. I should add if it is based on the same claim. Under section 326(2) of the National Land Code the power to extend the life of the caveat lies with the court. The respondent ignored the Collector's notice to remove the caveat. She did not apply to the court for extension. Applying the above principle, the removal by the Collector has the effect of extinguishing the caveat. In my view, the action of the respondent in lodging another caveat, based on the same claim after the Collector had removed the first caveat and without seeking the court's order, was tantamount not only to spurning the Collector's act done according to law, but also to usurping the powers of the court. Considering this act of the respondent and then her non-disclosure to the court that the first caveat had been removed, I do not think she has any ground, equitable or legal, to maintain the caveat. Further, the land, by reason of her own act in having transferred it, has lost its original user, as it is being developed into a housing estate. The applicant must have expended substantial sums for the development. Regard must be had to this and to public interest as well. But in spite of all this, I would not say that the respondent is without remedy. If she could establish her claim, damages should be appropriate remedy in the circumstances of the case."

I was fully in agreement with the interpretation of the law by my learned brothers and had no hesitation in following it. I therefore ordered that the application be allowed with costs and the said caveat be removed forthwith.

Application allowed.

Solicitors: *Lim Kean Siew & Co.; Presgrave & Matthews.*

FOREST DEVELOPMENT SDN. BHD. v. SYARIKAT PERMODALAN DAN PERUSAHAAN PAHANG BHD.

[O.C.J. (George J.) April 16, 1981]
[Kuantan — Civil Suit No. 148 of 1980]

Arbitration — Agreement referring to arbitration — Breach of agreement — Purported termination of agreement — Application for stay of action — Whether party terminating agreement could still rely on arbitration clause — Arbitration Act, 1952, s. 6.

The defendants in this case sought for an application for a stay of all further proceedings in the action pursuant to section 6 of the Arbitration Act, 1952, and in reliance on the arbitration clause contained in a written agreement entered into by the plaintiffs and the defendants on May 8, 1976.

A number of differences and disputes between the parties had arisen which culminated in the defendants purporting to terminate the Agreement.

The basic issue for adjudication between the parties was whether the defendants by their action in purporting to terminate the Agreement were in breach of the terms of the Agreement.

Held: (1) the act of purporting to terminate the Agreement was not, *per se*, tantamount to a demonstration of unwillingness on the part of the defendant to have the disputes and differences between the parties arbitrated upon;

(2) the defendants were entitled to have the action stayed under section 6 of the Arbitration Act 1952.

Cases referred to:-

(1) *Davis* v. *Starr* (1889) 41 Ch. D. 242.

(2) *Renshaw* v. *Queen Anne Residential Mansions and Hotel Co. Ltd.* (1897) 1 Q.B. 662.
(3) *Parry* v. *Liverpool Malt Co.* [1900] 1 Q.B. 339.
(4) *Heyman & Anor.* v. *Darwins Ltd.* [1942] 1 All E.R. 337, 343.

CIVIL SUIT.

S. Sivasubramanian for the plaintiffs.

G.K. Singham for the defendants.

George J.: The matter before me is the summons-in-chambers registered as No. J. 239/80 which is an application by the defendant (Permodalan) pursuant to section 6 of the Arbitration Act, 1952 for a stay of all further proceedings in the action on the ground that the plaintiff (Forest) and Permodalan had agreed to refer to arbitration the issues sought to be tried in this court.

The parties had on May 8, 1976 entered into a written agreement under the terms of which they were to embark on a joint venture in the business of sawmilling and other businesses related thereto. Pursuant to this agreement the parties in fact commenced the said business and operated a sawmill known as the Belimbing Sawmill at Kampong Belimbing on the Kuantan-Temerloh Road.

Clause 11.4 of the said agreement provides that

"All questions or differences or disputes which may arise between both parties shall be referred to a single arbitrator to be agreed upon by both parties... in accordance with the Arbitration Ordinance 1950 or any statutory re-enactment or any modification thereof."

A number of differences and disputes between the parties had arisen which culminated in Permodalan purporting to terminate the agreement and putting Forest out of the sawmill by making the saws inoperative and preventing the workers from entering into the sawmill.

Forest's contention is that Permodalan was not entitled to terminate the agreement.

The said agreement has terms providing for the termination of the agreement as follows: —

"10.2 In the event of Forest Industries failing to commence sawmilling by 1st April, 1976 and/or in the event of Forest Industries failing to adhere to the progress schedule of sawmilling performance as hereinbefore mentioned Permodalan shall have the right to terminate this Agreement forthwith upon giving 30 days written intimation to Forest to this effect.

10.3 If Forest commits a breach of any of the terms and conditions of this Agreement Permodalan shall give a written notice to require Forest to remedy the matter within one (1) month and if the matter complained of is not so remedied, Permodalan shall have the right to terminate this Agreement.

10.4 Upon the termination of this Agreement Forest Industries shall immediately cease sawmilling operation at Belimbing Sawmill and the parties hereto shall take such necessary action to wind up Forest Industries.

10.5 Upon the winding up of Forest Industries the net assets of the company shall be divided up between the parties in equal proportion."

Mr. Gandhi K. Singham's contention on behalf of Permodalan is that since the parties had included an arbitration clause in the agreement and (in his submission) there being no sufficient reason why the matter should not be referred to arbitration, there should be a stay of these proceedings. He referred me to page 175 of the 19th edition of *Russell* on Arbitration where the learned author has set out the matters that the court should consider in deciding whether to exercise its discretionary power to stay the proceedings commenced in court of which the question of whether Permodalan was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, is relevant. This requirement in fact is embodied in section 6 of the Act.

Mr. S. Sivasubramanian for Forest contends that the affidavit evidence demonstrates that when the proceedings were commenced Permodalan were not ready and willing to go to arbitration. His contention appears to be that if Permodalan were of the opinion that they were entitled to terminate the agreement they should not have proceeded to do so but should have referred the question of whether they were entitled to terminate the agreement to the decision of an arbitrator. It is Mr. Sivasubramanian's submission that the act of purporting to terminate the agreement is demonstrative of unwillingness to go to arbitration. He sought support for his contention from the judgment in *Davis* v. *Starr*.[1] In that case, before a fixed term of employment of an agent had expired, the principal dismissed the agent for alleged misconduct. Thereafter the principal gave notice to the agent to refer the matters in dispute between them to arbitration, but he did not specify the dismissal of the agent as one of the matters in dispute. The agent brought an action against the principal to restrain him from dismissing him and from appointing another agent. The principal moved to stay proceedings in the action on the ground of the agreement to refer all matters in dispute to arbitration. The Court of Appeal held that the principal having taken upon himself to dismiss the plaintiff without waiting the decision of the matters in difference by arbitration the court ought not to exercise its power of staying proceedings in the action. In the course of his judgment in that case at page 246 Cotton L.J. said,

"In the month of August the defendant complained of the plaintiff, and said that he had violated his contract. If there had been no doubt of that he would have been justified in dismissing the plaintiff from his employment. But there was a dispute about it, and instead of waiting for the decision of the arbitrators whether the plaintiff had committed the offences charged against him, he takes upon himself to dismiss him and appoints another agent in his place. If he had abstained from dismissing him till the arbitrators had decided the differences between them, or had been willing to withdraw the dismissal till they had decided them, it might have been right for us to stay this action."

It is interesting to note that Lindley L.J. was one of the members of the quorum of the Court of Appeal in that case and had said that he was entirely of the same opinion as Cotton L.J.

A few years later in 1897 in the case of *Renshaw* v. *Queen Anne Residential Mansions and Hotel Company Limited*,[2] Lord Esher M.R. referred to *Davis* v. *Starr* and said with reference to that case:

"It appears from the judgments of Lindley and Lopes L.JJ. that the defendant there was not ready and willing to submit the whole matter to arbitration, but was only ready and willing to refer the assessment of damages. In the present case the defendants were ready and willing to refer the whole matter."

In *Renshaw's* case the defendants prematurely dis-

missed the plaintiff on the ground of alleged misconduct and the plaintiff thereupon brought an action against the defendants claiming damages for wrongful dismissal. The Court of Appeal was of the view that the plaintiff's claim to arbitration could be enforced.

In 1899 in the case of *Parry* v. *Liverpool Malt Company*[3] Lord Lindley (by then Master of the Rolls) opened his judgment by saying:

"The arguments have satisfied me that in *Davis* v. *Starr* this court took a wrong view of the facts, though not, I think, of the law. The principle upon which we proceeded in that case was right enough, because we came to the conclusion that the applicant there — a man who wanted to enforce the arbitration clause — was not, in the language of the Act, at the time when the proceedings were commenced, nor still remained, 'ready and willing to do all things necessary to the proper conduct of the arbitration.' Assuming that we were right on the facts, the decision was right enough. I now think that we took an erroneous view of the facts. I prefer myself the observations made and the view taken on similar facts in the later case of *Renshaw* v. *Queen Anne Mansions Co.* Probably it was the view we took of the facts in *Davis* v. *Starr* which unfortunately led to the present action being brought."

The basic issue for adjudication between the parties in the instant case is whether Permodalan by their action in purporting to terminate the agreement were in breach of the terms of the agreement of May 8, 1976.

Now there is no suggestion that the agreement was *void ab initio* or had come to naught as a result of frustration.

In the House of Lords in *Heyman & Anor.* v. *Darwins Ltd.*[4] Viscount Simon L.C. said:

"If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly."

The act of purporting to terminate the agreement does not, *per se,* tantamount to a demonstration of unwillingness on the part of Permodalan to have the disputes and differences between the parties arbitrated upon. *Davis* v. *Starr* may have suggested otherwise and may have misled Forest into taking the stand it is now taking but in *Parry* v. *Liverpool Malt Co.,* the Court of Appeal went on to explain *Davis* v. *Starr* and followed *Renshaw's* case, guided by which I am of the view that Permodalan are entitled to have action stayed under section 6 of the Arbitration Act of 1952 and there shall be an order to that effect with liberty to apply. Forest shall pay the costs of and incidental to this application.

Order accordingly.

Solicitors: *Sivasubramanian; Zuki, Gandhi & Amin.*

CHEE CHIEW HEONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Chan J.) April 25, 1981]
[Ipoh — Perak Criminal Appeal No. 33 of 1978]

Dangerous Drugs — Possession of 1146.33 gms. heroin and 81.03 gms. morphine — Trafficking — Cautioned statement not considered — Conviction quashed — Dangerous Drugs Ordinance 1952, ss. 37(d) & (da); 39B.

Dangerous Drugs — Possession of 1146.33 gms. heroin and 81.03 gms. morphine — Trafficking — Rebuttable presumption — Scope of Dangerous Drugs Ordinance 1952, s. 37(d) & (da).

Criminal Law and Procedure — Cautioned statement — Failure of trial judge to consider cautioned statement — Effect of.

The appellant in this case was found by Customs Officers asleep in a train on March 8, 1977. Next to her, close to her face was found a parcel which was later found to contain 1146.33 gms of heroin and 81.03 gms of morphine.

Since the accused was found to be in possession of the parcel which contained the drugs, then by virtue of section 37(d) of the Dangerous Drugs Ordinance 1952 she would be deemed to be in possession of and to know of the existence of such drugs until the contrary is proved. Section 37(da) provides that proof of possession of more than 100 gms of heroin or morphine raises a rebuttable presumption that the possession is for the purpose of trafficking. The defence was called and at the conclusion of the trial, the accused was convicted of the offence of trafficking in the drugs contrary to section 39B of the Dangerous Drugs Ordinance 1952, and was given the mandatory term of life imprisonment.

It was found that the learned President had ignored the cautioned statement of the accused which was put in evidence by the prosecution and so formed part of the prosecution's case.

Held, allowing the appeal: (1) the presumption in section 37(d) that possession of the container in which the dangerous drug is found is deemed to be possession of the drug itself is a rebuttable one;

(2) a presumption can be rebutted from the evidence adduced by the prosecution;

(3) in the present case, the presumption had been rebutted by the cautioned statement;

(4) the defence ought not to have been called at the close of the prosecution's case. The presumption had been rebutted. All that had been proved by the prosecution at that stage was that she was in possession of a parcel. There was no evidence to show that the accused knew that the parcel contained heroin and morphine;

(5) there would be no order of a retrial and the conviction should be quashed and sentence set aside.

Cases referred to:-

(1) *Lim Yow Choon* v. *Public Prosecutor* [1972] 1 M.L.J. 205.

(2) *Soo Seng Huat* v. *Public Prosecutor* [1968] 1 M.L.J. 80.

(3) *Reid* v. *The Queen* [1980] A.C. 343, 348, P.C.

CRIMINAL APPEAL.

Karpal Singh for the appellant.

Mohamed Shafee Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chan J.: On the night of March 8, 1977, the mail train from Butterworth to Kuala Lumpur was searched by Customs officers when it arrived at Ipoh. On board the train, in a coach with sleeping berths, the officers came upon the accused, who appeared to be sleeping. Next to her, close to her face, was a parcel